



CCHR Briefing Note – October 2013

Severance of Proceedings in Case 002 at the Extraordinary Chambers in the Courts of Cambodia

Executive summary

This Briefing Note aims at summarizing developments in the long-awaited trial of former Khmer Rouge leaders Nuon Chea and Khieu Samphan (“Case 002”) at the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”). This Briefing Note will focus particularly on the decision of the Trial Chamber of the ECCC to split Case 002 into an undetermined number of sub-trials (the “Severance”) and will address the way it impacts the progress of the Khmer Rouge trials and, more generally, the achievement of justice and national reconciliation in the Kingdom of Cambodia (“Cambodia”). The first segment (or sub-trial) of Case 002 (“Case 002/01”) focuses only on forced movement and on the killings of Khmer Republic soldiers at Tuol Po Chrey, while the gravest allegations of, inter alia, religious persecutions, genocide and forced marriage, have been deferred to future trials. Yet, with uncertain foreign funding, government obstruction and concerns over the health of the remaining accused, the likeliness of such trials occurring is slim *at best*.

The first section of this Briefing Note provides some background information to the ECCC, Case 002 and Case 002/01. The second section then describes the legal arguments and counter-arguments that were put forward by each party when severing the trial, while the third section consists of an in-depth analysis of the impacts of the Severance decision and the chosen scope of Case 002/01. Finally, this Briefing Note recommends five key areas which must be addressed by relevant stakeholders:

1. Increasing efforts to resolve the current funding crisis and to ensure future funding;
2. Ensuring future sub-trials under Case 002 are fully supported, including through financial support;
3. Implementing alternative mechanisms to address crimes committed by the Khmer Rouge, which may not be addressed through future trials;
4. Fully addressing allegations of political interference into proceedings; and
5. Promoting the legacy of the ECCC, especially as it regards its potential impact on the Cambodian judiciary.

This Briefing Note is written by the Cambodian Center for Human Rights (“CCHR”), a leading, non-aligned, independent non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights – in Cambodia.

Background

This section provides an overview of the ECCC, including a brief summary of the cases thus far and of the challenges which the ECCC has been faced with, and an introduction to Case 002/01 and the Severance.

The ECCC and its challenges

The ECCC was established within the Cambodian judicial system following an agreement between the Royal Government of Cambodia (the “RGC”) and the United Nations (“UN”),¹ and was officially inaugurated in 2006. The hybrid court is tasked with the trial of “senior leaders” and those “most responsible” for crimes allegedly committed between 17 April 1975 and 6 January 1979, which resulted in the deaths of an estimated 1.7 million up to 2.2 million Cambodians – a quarter of the total population.

Only one case at the ECCC has been completed thus far: Case 001, which involved Kaing Guek Eav, alias Duch, the chief of the notorious Tuol Sleng prison and torture center (“S-21”), who cooperated with the court and confessed to his crimes. On 26 July 2010, the Trial Chamber sentenced Duch to 35 years in prison for crimes against humanity and grave breaches of the Geneva Conventions, a sentence that was reduced to 19 years as the judges took into account time served during his illegal detention in a military prison.² Both the Office of the co-Prosecutors (the “Prosecution”) and the Defense appealed the judgment and, on 3 February 2012, the ECCC’s Supreme Court Chamber (the “SCC”) upheld Duch’s conviction, entered separate convictions for crimes against humanity and inhumane acts and subsequently increased his sentence to life in prison.³

The ECCC is currently addressing Case 002, which originally involved four accused, all representing the most senior leadership of the Khmer Rouge: Nuon Chea, former Deputy secretary of the Communist Party of Kampuchea; Khieu Samphan, former head of State; Ieng Sary, former Minister of Foreign Affairs; and Ieng Thirith, former Minister for Social Affairs.⁴ Given the gravity of the alleged crimes and the level of defendants, Case 002 is considered a landmark in international criminal justice and has been hailed by some as the most important and complex trial since the Nuremberg trials given the number of victims and the scale of the atrocities committed.⁵

On 13 September 2012, the case against Ieng Thirith was suspended after she was ruled unfit to stand trial due to her dementia.⁶ Later, on 14 March 2013, her husband Ieng Sary died of old age. Both thus remain entitled to a legal presumption of innocence, and their accountability for the crimes committed under the Khmer Rouge — like those of Pol Pot and Ta Mok who also died before facing trial — will now be left to historians to judge. Such developments, together with mounting concerns over the health of the two remaining defendants in Case 002 (Nuon Chea and Khieu Samphan), have revived frustrations at the pace of the ECCC and thrown into sharp relief the many delays that have already threatened to deny justice to the victims of the Khmer Rouge.

¹ ECCC Law on the establishment of the Extraordinary Chambers as amended (2004)

http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf

² Trial Chamber, ‘Judgment in Case 001’, Document no. E188 (26 July 2010)

³ SCC, ‘Appeal Judgment’, Document no. F28 (3 February 2012)

⁴ For an in-depth examination of the responsibility of former Khmer Rouge leaders before the ECCC, see Stephen Heder & Brian Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, War Crimes Research Office, Washington College of Law, American University (June 2011) <www.wcl.american.edu/warcrimes/khmerrouge.pdf>

⁵ See, for example, the statement of UK Foreign Secretary William Hague to the British Parliament, when pledging additional funds to the ECCC: <https://www.gov.uk/government/speeches/uk-support-for-court-of-cambodia-and-tribunal-for-lebanon>

⁶ SCC, ‘Decision on Immediate Appeal against the Trial Chamber’s Order to unconditionally release the Accused IENG Thirith’, Document no. E138/1/10/1/5/7 (14 December 2012)

The ECCC is further imperiled by dwindling foreign funding, coupled with the refusal of the RGC to cover its financial responsibility to the national side of the court, thereby breaching the initial agreement establishing the ECCC.⁷ The RGC's failure to pay the Cambodian staff is another example of stalling tactics and obstruction to undermine efforts to bring former Khmer Rouge leaders to justice. This is clearly reflected in the RGC's unwavering position that the ECCC does not investigate Cases 003 and 004.⁸ Indeed, the RGC has publicly expressed its desire to see the ECCC shuttered after the current round of proceedings.⁹ The two planned cases involving mid-ranking cadre will therefore likely never go to trial.

All these elements - the frail health of the remaining defendants, the financial crisis hanging over the entire institution and RGC obstruction in Cases 003 and 004 - make imperative the need for a timely and exhaustive decision on the liability of the defendants in Case 002/01.

From Case 002 to Case 002/1

The basis of proceedings in Case 002 is formed by the Closing Order (the "Indictment") issued by the Office of the co-Investigating Judges (the "OCIJ").¹⁰ The (originally) four defendants are therewith accused individually, as well as part of a joint criminal enterprise, of the following crimes:

- **Crimes against humanity:** murder, extermination, enslavement, deportation (of Vietnamese), imprisonment, torture, persecution on political, religious grounds, rape (only in the context of forced marriage) and other "inhumane acts", namely the forcible transfer of population, forced marriage, forced disappearance and "attacks against human dignity".
- **Grave breaches of the Geneva Conventions** of 12 August 1949: willful killing, torture, inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian the rights to a fair trial, unlawful deportation or confinement of civilians.
- **Genocide** of the Cham and the Vietnamese.¹¹

In addition, the defendants, as part of a joint criminal enterprise, are accused of five high-level "**policies**": (a) forcing **population movements**; (b) establishing and operating **work cooperatives**; (c) re-educating "bad elements" and **killing "enemies"** inside and outside of the Communist Party of Kampuchea; (d) **targeting the Cham, Vietnamese, Buddhists, and former officials of the Khmer Republic**; and (e) **regulating marriage**.¹²

⁷ Human Rights Watch, 'Cambodia: Government Obstructs Khmer Rouge Court' (News)(5 September 2013) <www.hrw.org/news/2013/09/05/cambodia-government-obstructs-khmer-rouge-court>

⁸ The Office of the co-Investigative Judges has filed Introductory Submissions in two further cases, Cases 003 and 004, which concern an additional five suspects. These cases have been very controversial and allegedly subject to extensive interference by the RGC, which does not want to see these cases move forward. More information about these cases is available on the ECCC's website at <http://www.eccc.gov.kh/en/case/topic/286> for Case 003 and <http://www.eccc.gov.kh/en/case/topic/98> for Case 004.

⁹ See, for example, the statement of Hun Sen and the Foreign Minister Hor Namhong alleging that the pending investigations in Cases 003 and 004 were a threat for the country's stability and these cases will not be allowed: <www.phnompenhpost.com/national/judges-give-krt-update>

¹⁰ OCIJ, 'Closing Order', Document no. D427 (15 September 2010) <www.eccc.gov.kh/en/documents/court/closing-order>.

¹¹ The Indictment also originally included crimes punishable under the Cambodian Penal Code of 1956 but these charges were eventually ruled out by the Trial Chamber.

¹² Ibid, para. 1525

On 22 September 2011, shortly before substantive hearings began, the Trial Chamber decided to sever the complex Case 002 into a series of discrete sub-trials, each including only a limited number of charges of the Indictment (the “Severance”).¹³ The Trial Chamber ruled that the first sub-trial under this line of proceedings (“Case 002/01”) would deal solely with forced movement of the population from the cities to rural areas from 17 April 1975 to mid-1976. The scope of the trial was later extended to executions of Khmer Republic soldiers at Tuol Po Chrey. However, many (if not all) of the gravest crime allegations, among which religious persecutions, forced marriage, security centers and worksites as well as genocide, have been deferred to unspecified future trials. As will be addressed in further detail below, despite being criticized by the Prosecution, the Defense, and the Civil Parties, as well as by legal experts, for its lack of representativeness, the scope has remained mostly unchanged and the Severance has been governing the proceedings since then.

Opening statements in Case 002/1 began on 21 November 2011 and the Court has held both substantive and impact (or reparations) hearings for this first sub-trial. The Trial Chamber has sat for 212 days of hearing, hearing from over 92 individuals giving evidence, including three expert witnesses, 52 fact witnesses, five character witnesses and 32 Civil Parties.¹⁴ The trial has been subject to a significant public interest, with 98,670 persons attending the trial.¹⁵ Importantly, there has been an unprecedented interest among victims to be involved as Civil Parties to the case, with close to 4,000 of them being admitted as such. Closing Statements are currently scheduled to begin on 16 October 2013.¹⁶

Progress in Case 002/01 has been stalled by unfortunate events such as the death of Ieng Sary and the dismissal of Ieng Thirith. Moreover, Cambodian interpreters and translators who had not been paid since November 2012 went on strike for two weeks, forcing a halt on proceedings. In September 2013, about 200 local staff went on strike again over months of unpaid wages, further threatening to shut down the ECCC’s entire operation.¹⁷ Both times, the international side of the Khmer Rouge tribunal had to transfer funding to the Cambodian side so that it could continue its operations.¹⁸

To add further to the complexity of Case 002/01, it is worth noting that, unlike Duch who cooperated with the Court and confessed to his crimes, Nuon Chea and Khieu Samphan have mostly refused to testify and answer questions, citing compromised fair trial rights and exercising their right to remain silent.¹⁹ Although they both delivered rare apology statements, they have always claimed

¹³ Trial Chamber, ‘Severance Order pursuant to Internal Rule 89ter’, Document no. E124 (22 September 2011) (the “Severance Order”)

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ ECCC, ‘Closing statements in Case 002/01 to commence at 9 October 2013’ (24 July 2013) <www.eccc.gov.kh/en/articles/closing-statements-case-00201-commence-9-october-2013>

¹⁷ ‘Cambodian Khmer Rouge tribunal staff go on strike’, *The Guardian* (4 March 2013) <www.theguardian.com/world/2013/mar/04/cambodian-khmer-rouge-tribunal-staff-strike>

¹⁸ See Statement Attributable to the Spokesperson for United Nations Assistance to the Khmer Rouge Trials on a loan for payment of national salaries at the ECCC (18 September 2013) <<http://unakrt-online.org/articles/statement-attributable-spokesperson-united-nations-assistance-khmer-rouge-trials-loan>>

¹⁹ See ‘Khieu Samphan is forced to remain silent’, a letter to the Editor of the Phnom Penh Post by Khieu Samphan’s Defense Team (18 July 2013) <www.phnompenhpost.com/analysis-and-op-ed/khieu-samphan-forced-remain-silent>.

that they believed they were acting in the best interests of the nation and had been unaware of the full extent of killings under the regime, thereby denying legal responsibility.²⁰

The severance of proceedings and legal arguments

This section provides a procedural background to the Severance and the quarrel over the scope of Case 002/01, describing the arguments and counter-arguments that were put forward by each party, namely the Trial Chamber, the Prosecution, the Defense and the Civil Parties. This description is not meant to be a comprehensive account of all points of law raised but aims at shedding light on the issue of the Severance and the reasons that led to it, so that its impact can be better assessed.

Procedural history

On the eve of trial in October 2011, the Trial Chamber severed the Indictment,²¹ acting pursuant to Internal Rule 89ter,²² which was adopted a few weeks before and provides:

“When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.”

The Trial Chamber thus considered that it was in the “interests of justice” to split the complex Indictment into smaller, more manageable parts that would take shorter period of time to hear, thereby safeguarding its ability to render any timely verdict in Case 002. The Trial Chamber also delineated the material scope of Case 002/01, the first of an unspecified number of trials to be conducted under this line of proceeding. Case 002/01 thus aims to:²³

1. Establish the roles played by the accused in all of the policies covered by the Closing Order, thus forming the basis for the charges to be examined in the future trials; and
2. Try the alleged crimes of forced population transfer phases 1 and 2 and associated crimes against humanity (including murder, extermination, forced transfer and enforced disappearances, *only insofar as they pertain to the movement of population* phases 1 and 2).

In other words, of the five country-wide criminal policies for which the former senior Khmer Rouge leaders are accused of responsibility, only one is at issue: **forced transfer**. Specifically, what is addressed is the forced transfer of the population of Phnom Penh beginning on 17 April 1975 (“Phase 1”), and the subsequent forced transfer of hundreds of thousands of Cambodians to the north of the country between late 1975 and 1977 (“Phase 2”). Other charges related to worksites, cooperatives, forced marriage, security centers and execution sites, as well as forced movements from the Eastern Zone (“Phase 3”) were left aside, and all allegations of genocide and persecution on religious grounds as a crime against humanity and gravest breaches of the Geneva Conventions of 1949 were also deferred to unspecified future trials.²⁴

²⁰ ‘Khmer Rouge leader Nuon Chea expresses remorse’, BBC News (31 May 2013) <www.bbc.co.uk/news/world-asia-22726373>

²¹ Trial Chamber, Severance Order, *supra*.

²² ECCC Internal Rules <[www.eccc.gov.kh/sites/default/files/legal-documents/ECCC Internal Rules \(Rev.8\) English.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(R%20Rev.8)%20English.pdf)>

²³ SCC Decision, para. 1 and 5.

²⁴ Trial Chamber, Severance Order, para. 7

On 3 October 2011, the Prosecution notified the Trial Chamber of a “Request for reconsideration” of the Severance Order.²⁵ Although agreeing that the Indictment should be trimmed due to the scale and complexity of Case 002, the Prosecution asked for the inclusion of a more representative selection of charges, raising concerns that the elderly accused would not live long enough to face a second sub-trial.²⁶ The Prosecution therefore proposed a first alternative severance with a number of additional crime sites,²⁷ which the Trial Chamber rejected in its entirety.²⁸ The Prosecution thus scaled back its request and asked for the inclusion of:²⁹

- The District 12 execution site ("District 12");
- The Tuol Po Chrey execution site ("Tuol Po Chrey", where hundreds of Khmer Republic soldiers and officials were allegedly executed by Khmer Rouge forces); and
- The S-21 security center (also known as Tuol Sleng), including the purges of cadres from the New North, Central (Old North) and East Zones sent to S-21, but excluding the Prey Sar worksite.

The Trial Chamber conceded a modest extension to killings at Tuol Po Chrey, but only insofar as they were incidents that occurred *immediately* after the evacuation of Phnom Penh (in other words, excluding killings that occurred later, between 1976 and 1977).³⁰ The Judges refused to entertain the Prosecution’s proposals to include allegations concerning S-21 and District 12, holding that it would involve a too “*substantial prolongation of the trial*” (for example, by increasing the amount of witnesses to be heard).³¹

The Prosecution filed an immediate appeal against the Trial Chamber’s Severance Order, submitting that it contained errors of law and errors of fact and argued that, notably, security center S-21 (together with the execution site of Choeung Ek) and District 12 should be included as they are crucial to a proper understanding of Case 002 as a whole.

On 8 February 2013, ruling upon the Prosecution’s appeal, the SCC annulled the Severance Order,³² finding a number of errors of law, including a lack of reasoning regarding “*how the severance advances the interests of the justice*”³³ and the failure to consult with the parties on the terms of

²⁵ Office of the Co-Prosecutors, ‘Request for reconsideration of Severance order pursuant to internal rule 89ter’, Document No. E124/2 (3 October 2011) The OCP sought a first sub trial that included: phase 1 forced movement from Phnom Penh and ensuing executions of Lon Nol officials or soldiers and class enemies in District 12 and Tuol Po Chrey; the S-21 Security Centre, including the purges of cadres from the new North, Central (old North) and East Zones sent to S-21, but excluding the Prey Sar Worksite; the North Zone, Kraing Ta Chan and Au Kanseng Security Centres; and the Kampong Chhnang Airport Construction Site and Tram Kok Cooperatives.

²⁶ Ibid., paras. 3, 18-19, 21-24, 29-32, 36, 44.

²⁷ Office of the Co-Prosecutors, Second Request for Reconsideration, (27 January 2012), para. 36.

²⁸ Trial Chamber, ‘Decision on Reconsideration’ (18 October 2011).

²⁹ Office of the Co-Prosecutors, ‘Request to Include Additional Crime Sites within the Scope of Trial in Case 002/1’ Document no. E163 (27 January 2012), paras 4 and 33, *referring to thereto connected paragraphs of OCIJ, ‘Closing Order’, Document no. D427 (15 September 2010).*

³⁰ Trial Chamber, ‘Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs’ (8 October 2012), para. 3

³¹ Ibid. para 2

³² SCC, ‘Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01’, Document no. E/163/5/1/13 (8 February 2013)

³³ Ibid, para 41, 48

Severance (which the Trial Chamber had considered both legally unnecessary and likely to result in unacceptable delay). The SCC ruled that the Trial Chamber must reassess its approach to the Severance after hearing all parties' submissions and balancing "all parties' respective interests" against "all relevant factors",³⁴ as well as explain its plan for adjudicating any charges excluded from the first trial.³⁵

A year-and-a-half into trial and nearing the end of evidentiary hearings, the Trial Chamber immediately scheduled three days of hearings on the parties' views in light of the SCC decision. The Prosecution, cognizant of the time and effort already expended, sought to add the S-21 security center only. The Civil Party lawyers, likewise concerned that an expansion of the original charges would prevent a timely verdict from being reached, did not propose adding any additional crimes but limited themselves to supporting the Prosecution's request. All defense teams, on the other hand, argued that only a trial on the *entirety* of the charges in the Indictment would protect the defendants' fundamental rights (see below).

On 26 April 2013, the Trial Chamber ruled again on the issue of the Severance.³⁶ Concluding that none of the proposals made by the parties enabled the Trial Chamber to improve the representativeness of Case 002/01 as it understands that notion, the Trial Chamber reaffirmed the appropriateness of the status quo. The only criminal policy the co-Accused will be tried on in Case 002/01 remains forced movement, and no further crime sites (S-21 in particular) will be included. At a moment when the death of Ieng Sary and concerns over the health of Nuon Chea had already caused significant trial management challenges, expanding the scope of Case 002/01 was considered a risky gamble.³⁷ For the first time, however, although acknowledging that the possibility of future trials is contingent upon the health of the co-Accused and donor support to the ECCC,³⁸ the Trial Chamber provided a "tentative outline for future trials in Case 002", anticipating two additional trials, one addressing security centers, execution sites, and genocide against the Cham and Vietnamese population, and another dealing with crimes related to cooperatives and worksites, the Phase 3 forced population movement, the targeting of Buddhists and forced marriage.³⁹

Both the Prosecution and Nuon Chea's Defense Team took issue with the way in which the Trial Chamber (re)defined the scope of Case 002/01, and separately appealed this second decision.⁴⁰ While the Prosecution further sought the incorporation of S-21 to Case 002/01, Nuon Chea's Defense Team argued that only a single trial on all charges of the Indictment could uphold his fundamental fair trial rights.

On 23 July 2013, a few minutes after the conclusion of what turned out to be the last hearing of the trial before the closing arguments, the SCC issued a decision where, somewhat contradicting its

³⁴ Ibid. para. 50

³⁵ Ibid. para 47

³⁶ Trial Chamber, 'Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013', Document No. E284 (26 April 2013)

³⁷ Ibid., para. 3-4

³⁸ Ibid. para 153

³⁹ Ibid. para 155

⁴⁰ Office of the Co-Prosecutors, 'Immediate appeal of second decision on severance of case 002/1, Document No. E284/2/1 (10 May 2013); Nuon Chea, 'Immediate appeal against the Trial Chamber's second decision on severance and response to Co-Prosecutors' second severance appeal', Document No. E284/4/1 (27 May 2013)

previous stance, it rejected both appeals on the merits.⁴¹ The SCC reiterated that the Trial Chamber committed an error of law, as well as an error in the exercise of its discretion, in determining the scope of the trial. Moreover, it agreed with the parties' submissions that the charges as defined by the Trial Chamber were insufficiently representative of the Indictment. Nevertheless, it rejected both appeals on the merits, on the grounds that "*concerns of the effective management of the entirety of charges pending before the Trial Chamber prevail over the postulate that Case 002/01 be reasonably representative of the Indictment*". It accordingly instructed that "*charges that should have been included within the scope of Case 002/01 w[ould] instead form part of the scope of Case 002/02*",⁴² which should comprise, at minimum, the charges related to the security prison S-21, a worksite, a cooperative and genocide. The SCC ordered the commencement of proceedings in the next sub-trial ("Case 002/02") as soon as possible after closing submissions in Case 002/01 (in other words, before a verdict in Case 002/01 is reached). To this end, it instructed the Office of Administration of the ECCC to explore the establishment of a second panel of national and international judges within the Trial Chamber.⁴³

Arguments in favor of and against forced movement

In the Trial Chamber's view, the principal motivations in beginning the trial with charges of forced movement seem to have been to follow the chronological order of the Closing Order, to establish the role and responsibility of the accused for subsequent trials and to involve as many civil parties as possible in the first phase of the trial.

The Prosecution, however, argued that crimes related to forced movement were not representative of the criminal conduct of the co-Accused as alleged in the Indictment and were in fact excluding some of the gravest forms of harm endured by the victims. This non-representativeness would hamper both the victims' search for justice and the establishment of an accurate historical record of the Khmer Rouge regime.⁴⁴ In a nutshell, the Severance would diminish the ECCC's potential impact on furthering national reconciliation in Cambodia and would therefore not be in the "interest of justice" (thereby contradicting Internal Rule 89ter).

The Prosecution's view - corroborated by the Civil Parties' Lead co-Lawyers - is that the inclusion of S-21, in particular, would ensure increased representativeness of the Closing Order by incorporating four additional crimes against humanity charges (namely enslavement, imprisonment, torture and other inhumane acts) as well as four grave breaches of the Geneva Conventions (willfully causing great suffering, willfully depriving a prisoner of war to a fair trial, unlawful deportation of civilians and unlawful confinement of civilians).⁴⁵ Including S-21 would also enhance geographical and temporal representativeness, generally increase the magnitude and severity of the crimes for which the co-Accused are being tried, and increase the number of victim groups, thus resulting in justice for a wider cross-section of individuals.

⁴¹ SCC, 'Decision on immediate appeals against Trial Chamber's second decision on severance of case 002', Document No. E/284/4/7 (23 July 2013)

⁴² Ibid. para. 11

⁴³ Ibid.

⁴⁴ Office of the Co-Prosecutors, 'Immediate appeal of second decision on severance of case 002/1', supra., paras 3, 32-34

⁴⁵ Transcript of hearing, 18 February 2013, pp. 45-48

To this, the Trial Chamber responded that it would be pointless to include only a few additional crime sites as *“no instance alone can be described as particularly representative in terms of number and nature of victims, when measured against the total criminality encapsulated [in the Indictment].”* The inclusion of S-21 in particular *“would encompass only a limited geographical area, encapsulate only a minor part of the overall victimization in Case 002 and compel the Chamber to re-hear allegations in relation to the only crime site to have been adjudicated before the ECCC to date.”*⁴⁶ With regards to the exclusion of allegations of genocide against the Vietnamese and Cham Muslim minorities and of grave breaches of the Geneva Convention from Case 002/01, the Trial Chamber argued that the allegations only involved a comparatively small number of victims, an argument which they upheld in their second ruling in July 2013.⁴⁷

Moreover, the Trial Chamber, citing jurisprudence from the International Criminal Tribunal for the former Yugoslavia (“ICTY”),⁴⁸ argued that forced movement was the most representative charge of all: *“forced movement perhaps constitutes the only theme in the Indictment to have involved or directly affected the entire Cambodian population. Other crime sites or charges, whilst each encompassing significant offenses and victim classes, describe crimes that occurred either within an individual locality or against a particular religious group.”*⁴⁹

When rejecting the appeals of both Nuon Chea and the Prosecution, the SCC held that, in any case, it was too late to make the charges representative, as *“concerns of the effective management of the entirety of charges pending before the Trial Chamber prevail over the postulate that Case 002/01 be reasonably representative of the Indictment.”*

Arguments of the Defense

In contrast with the Prosecution’s suggestion that the Trial Chamber continue to use the scope of the initial trial but with S-21 added to its purview, both Nuon Chea and Ieng Sary’s Defense Teams argued Case 002 should be heard in its entirety. Khieu Samphan, on the other hand, argued that it should not be the subject matters that should be severed but rather the accused, claiming that his case should be separated from the other two, less healthy co-Accused.

Nuon Chea’s Defense Team took the issue the furthest as it appealed the Severance decision (even though it had supported it in the first place). They argued that the Severance hinders Nuon Chea’s ability to mount a full and effective defense because his alleged criminal intent and responsibility must be assessed holistically, as *“a larger effort to restore order to a country and economy devastated by war, and independence to people placed for so many years under the foreign occupying and colonial powers.”*⁵⁰ In Defense counsel Victor Koppe’s words, Nuon Chea *“believes in what he did and why he did it”* and, considering his frail health, this trial is his only opportunity to explain his actions and present his defense to allegations in the Indictment.⁵¹

⁴⁶ Trial Chamber, Second Severance Decision, supra, para 41.

⁴⁷ Ibid. para 113

⁴⁸ Trial Chamber, Second severance Decision. Citing ICTY jurisprudence holding that representativeness shall be assessed against *“the relevant circumstances of the case”*, including *“the crimes alleged to have been committed, their scale, and the victims of the crimes”* (rule 73bis)

⁴⁹ Ibid. para 112

⁵⁰ Nuon Chea’s Immediate Appeal, supra, para. 13

⁵¹ Transcript, 20 February 2013, p. 3

Nuon Chea's Defense Team repeatedly argued that the genocide allegation in particular must be addressed, as it is both the most notorious charge and also the one that most "wrongfully" encapsulates both the Khmer Rouge and Nuon Chea's alleged leadership role within the regime. Despite the fact that the genocide charge addresses only the regime's treatment of Cham Muslim and Vietnamese groups, it is said to be highly "emblematic" of the Khmer Rouge policies and "*the sheer gravity of the genocide charge requires that this Chamber be especially vigilant in ensuring that Nuon Chea's right to contest the allegations against him is respected.*"⁵²

Moreover, Nuon Chea's Defense Team argued that the Prosecution and the Trial Chamber both in fact contravened the principle of the Severance by bringing evidence of conduct and policies falling outside the understood scope of Case 002/01. The Prosecution and the Civil Parties have admitted witness statements with no explanation as to their relevance, and this *in lieu* of oral testimony, thereby violating Nuon Chea's right to confront the witnesses against him.

Impact of the Severance

This section seeks to examine the ways in which the Severance has impacted several aspects of Case 002, including the furthering of the trial, the rights of the victims and, as the Defense would argue, the rights of the co-Accused.

Procedural concerns

The Severance, as a pragmatic means to accommodate practical concerns, was induced by the many setbacks the ECCC has faced since its establishment. Considering the scale and complexity of Case 002, which is unprecedented when compared to other international or hybrid criminal tribunals, and the advanced age of the remaining co-Accused, it is understandable that the judges sought to trim the Indictment in order to speed up the proceedings. This issue epitomizes the challenges of conducting both fair and expeditious proceedings, and the need to strike a careful balance between the rights of the victims in achieving meaningful justice and the rights of the accused to a timely trial.

By seeking to expedite the verdict, the Trial Chamber became the first international criminal court to contemplate holding consecutive trials based on one inter-related indictment, leading to trial progress in Case 002 being paradoxically slowed by many novel and unresolved procedural questions. Throughout the proceedings, the Trial Chamber, the Prosecution, the Defense and the Civil Parties have argued over the severance and/or the scope of the first trial, and it took until 23 July 2013 – the day the evidentiary hearings in Case 002/01 were coming to a close – for the SCC to issue a final decision. As a result, throughout the proceedings, there has been uncertainty regarding a number of issues, such as the precise evidentiary parameters of policies falling outside of Case 002/01.⁵³

It is worth keeping in mind that the final decision to reject the appeals of Nuon Chea and the Prosecution, which upheld the status quo, was taken by the very same panel which first blamed the

⁵² Nuon Chea's Immediate Appeal, *supra*, para. 39

⁵³ Anne Heindel, Legal Commentary: Co-Prosecutor Request Clarification on the Scope of Case 002/1 Charges (10 September 2013) <www.cambodiatribunal.org/2013/09/10/legal-commentary-co-prosecutors-request-clarification-of-the-scope-of-case-00201-charges/>.

Trial Chamber for insufficient legal reasoning and errors of law. It seems that, in order to avoid uncertainties and procedural delays, the “interest of justice” would have been better served if this important decision had been rendered earlier and with a detailed articulation of the grounds.

As discussed at length above, there are solid grounds to believe that this first segment of trial will be the last one. It is worth noting at this point that although Duch’s trial was considered as a very simple case, it still took three years for a final verdict to be delivered.⁵⁴ The very complex Case 002 is thus all the more unlikely to be a speedy one.

To avoid such delays, the SCC, as outlined above, has asked for the proceedings in Case 002/02 to start before a verdict in Case 002/01 is reached. This is however problematic on a procedural viewpoint, as Case 002/01 addresses overarching issues such as the existence of the alleged joint criminal enterprise and underlying criminal policies, which are all relevant to Case 002/02 and potential further trials. These will only be fully resolved once the final verdict is pronounced after potential defense appeals. Furthermore, there are very real practical considerations regarding physical space and funding would a new panel of judges for Case 002/02 be determined to be the best option moving forward.

Fair trial rights

The interests of the co-Accused, through their right to an expeditious trial, were repeatedly invoked by the Trial Chamber when it ruled to sever Case 002. The right to a speedy trial is indeed a core element of the rights to a fair trial and is deeply entrenched in international law, as reflected by Article 14(3)(c) of the International Covenant on Civil and Political Rights⁵⁵ and decisions of international human rights and criminal courts. However, how the Severance actually protects the interests of the co-Accused is not self-evident, as shown by the fact that the Severance Order and related decisions were repeatedly objected to by the Defense Teams.

Although Nuon Chea’s arguments and request to be tried on the entirety of the charges seem like a last-minute effort to avoid judgment (especially considering that he was supporting the idea of the severance at the start), it should be acknowledged that the Severance might have led to certain infringements of the co-Accused rights. Arguably, the uncertainty that surrounded the scope of the Case 002/01 throughout the whole proceedings have infringed upon the rights of the co-Accused to be clearly informed of the charges brought against them. Moreover, the SCC has not yet defined the scope of Case 002/02 with sufficient precision. Yet it is important that the scope of each trial be clearly defined, to avoid breaching the right of the accused to be informed of the charges brought against them.

The victims/civil parties

The right to an expeditious trial is not just a right of the accused but also belongs to the victims. The victims, too, are aging, and have a direct interest in seeing the co-Accused convicted promptly. The expeditiousness, however, needs to be carefully balanced with the need for *meaningful* and *representative* justice, which is being impeded by the exclusion of the gravest charges and forms of

⁵⁴ Initial hearings in Case 001 commenced on 17-18 February 2009 and the Supreme Court pronounces its final judgment on 3 February 2012.

⁵⁵ Article 14(3)(c) provides for “the right to be tried without undue delay”.

harm endured by the victims. There is little doubt that by considering the charges that epitomize the Khmer Rouge regime (such as worksites, genocide, forced marriage, and religious persecution), the ECCC would be better suited to render a meaningful ruling for survivors, who have waited almost four decades for justice, and this before the remaining senior leaders have passed away and the opportunity for justice is closed.

Given the high amount of Civil Parties in Case 002, it was decided that Civil Parties could no longer participate *individually* at trial against the personal injury they have suffered (as they did in Case 001), but that they could form a “collective” or “consolidated” group who are jointly represented by the Civil Party Lead Co-Lawyers. Moreover, the ECCC can only award “moral and collective” reparations. In making the decision to sever the trial, the Trial Chamber held that because the Civil Parties were forming a consolidated group, “*limiting the scope of the facts to be tried during the first trial ... has no impact on the nature of Civil Party participation at trial*”.⁵⁶

However, the Civil Parties lawyers and Lead Co-Lawyers strongly disagree and claim that the Severance does have critical legal and procedural consequences on Civil Party participation and the formulation of their reparation claims, as both are based on a demonstration that the harm suffered is directly linked to the alleged facts and crimes against the accused at trial.⁵⁷ The Severance thereby potentially excludes victims who have not directly suffered from forced movement.

Indeed, out of the 3,872 victims joined to the case, only about 750 were admitted due to harm related to crimes related to forced movement and executions at Tuol Po Chrey.⁵⁸ Although all of them have been admitted as Civil Parties by default, if victims have not suffered harm from one of the crimes charged in the case, their inclusion as Civil Parties arguably devalues the significance of that standing, as they will not hear their specific harm discussed and will not be able to speak in Court.⁵⁹ That being said, for some Civil Parties, “*being in Court and experiencing participation is more important than legal nuances,*”⁶⁰ which adds another layer of complexity in trying to address the rights of civil parties.

As a result of the Severance, the Trial Chamber has not given much latitude to witness and civil party evidence or testimonies that relate to policies beyond the narrow scope of the early phases of the forced evacuations. In other words, if a witness or civil party testified about being evacuated from Phnom Penh in 1975, and in the course of his or her testimony refers to policies that came into effect later in 1977 or 1978 which he or she witnessed or had knowledge of and which did not relate to the evacuations, the Trial Chamber deemed this irrelevant on its own instance or upheld the Defense’s objections in this regard. This is not only problematic from an evidentiary perspective, but also regrettably prevents the Civil Parties from expressing the full scale of their suffering.

⁵⁶ Trial Chamber, Severance Order, para. 8

⁵⁷ Lead Co-Lawyers, ‘Urgent request on the 19 October 2011 hearing following the Chamber’s memorandum, Doc no. E125 (7 October 2011), para. 12

⁵⁸ Lead Co-Lawyers, *supra*, para.13

⁵⁹ John Ciorciari and Anne Heindel, ‘Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal’, forthcoming, Michigan Journal of International Law (4 June 2013) <www.cambodiatribunal.org/wp-content/uploads/2013/08/commentary_13Fall.pdf>

⁶⁰ *Ibid.* p. 64

The Severance also impacted the delivery of reparations, which are first intended to “*acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted*” and “*provide benefits to the Civil Parties which address this harm.*”⁶¹ At the urging of the Civil Party lawyers, the Trial Chamber has clarified that reparations may benefit all Civil Parties in the consolidated group, regardless of whether their harm was a result of the crimes for which the accused are convicted.⁶² Receiving collective reparations as a member of a wide group of victims is however different from receiving recognition of the harm individually endured. Arguably, this approach makes the ECCC move towards a “victim participation model” rather than a system where individual victims are recognized as “full parties” to the proceedings, as is supposed to be the case at the ECCC.⁶³ Moreover, it is worth noting that reparations are contingent upon a number of factors, including sufficient funding.⁶⁴ A heavy burden is put on the Civil Parties themselves in that regard, as they are the ones supposed to gather the funds for the reparations.⁶⁵

Civil Parties might also find themselves deeply disappointed with the sentence handed down for the forced evacuations, which could be lower than what can be expected for large-scale murder and torture. For these reasons, it is important that the victims, who are key stakeholders in the ECCC’s judicial process, receive clear and consistent information about their standing in the trial and their rights to reparations. A recent report has shown that victims have positive attitudes towards the ECCC and high expectations in terms of recognition and reparations.⁶⁶ However, the report also notes that they have relatively poor knowledge of the court and trials, which suggests that they are lacking systematic and consistent information.⁶⁷ Thus, to avoid disappointment, alleged victims of crimes not covered in Case 002/01, such as forced marriage, crimes related to work sites, religious persecution or genocide, may need to see their expectations managed.

The public: a failure to establish an accurate historical account of facts

Although the focus of Case 002/01 on forced evacuations may be important for establishing the historical basis of the other crimes cited in the Indictment, it does not fully attend to the regime’s most severe human rights abuses, crimes and violations. Considering the high chance that this will be the last trial, the Severance will impact the legacy of the ECCC in establishing an accurate account of historical facts, which is an important purpose of international criminal justice.

The crime of forced marriage (and related crimes of sexual violence), for example, is most likely to never be addressed. Yet “*the use of forced marriage [...] was systematic and widespread [under the DK rule], employed by the regime to secure loyalty to the Government by breaking family bonds and taking [the] major life decision [of] who to marry out of the hands of citizens and entrusting it to the*

⁶¹ ECCC Internal Rules (rev. 8)

⁶² Trial Chamber, Second Severance Decision, para. 158

⁶³ John Ciorciari and Anne Heindel, *supra*, pp. 65-66

⁶⁴ Trial Chamber, Second Severance Decision, para 161, where the Trial Chamber, for the first time, acknowledged that the limited availability of financial resources to fund reparations and the likelihood that future trials may be prevented by the death or unfitness of the Accused “may deprive many Civil Parties of their right to an effective remedy for the harm they have suffered”.

⁶⁵ Phnom Penh Post, ‘Little time for reparations at KRT’ (7 August 2013) <www.phnompenhpost.com/national/little-time-reparations-krt>.

⁶⁶ Kirchenbauer N., Balthazard M., Ky L., Vinck P., Pham P. N., Victims Participation before the Extraordinary Chambers in the Courts of Cambodia, Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative (2013), p. iii

⁶⁷ *Ibid.* p. iv

State".⁶⁸ The stigma of such practice certainly endures today.⁶⁹ Similarly, allegations of genocide, although strictly referring to the targeted elimination of religious and ethnic groups such as the Vietnamese and Cham Muslim minorities, which are in many ways highly emblematic of the Khmer Rouge policies and which have had important impacts on the current relationship between these minorities and the Khmer majority population,⁷⁰ will likely never be discussed at the ECCC.

While the victims of these crimes and the crimes themselves are well documented in books, documentaries and other historical sources, judicial prosecutions and verdicts nevertheless have an important play in establishing incontrovertible culpability of these crimes. If the ECCC is unable to continue past Case 002/01 or even Case 002/02, historical record of the atrocities committed by the Khmer Rouge will be lacking.

Conclusion and recommendations

As discussed at length in this Briefing Note, the Severance has had serious implications on the development of Case 002 at the ECCC. Furthermore, both the success of the current proceedings and the possibility of future trials have been compromised by a series of additional factors, including recurring issues securing funding, especially for the national side of the ECCC, and political interference by the RGC.

Taking into consideration the high likelihood that Case 002/01 may be the only sub-trial in Case 002 and the last trial at the ECCC, steps must be taken by the ECCC, the international community and the RGC to ensure that the issues discussed throughout this Briefing Note are addressed, both at the ECCC and through other mechanisms. Moreover, all stakeholders must ensure that concrete efforts are taken to pursue further sub-trials in Case 002 and Cases 003 and 004.

Resolving the funding crisis

As enshrined in the ECCC Establishment Agreement, both the RGC and the UN are responsible for ensuring that the ECCC renders justice and provides for reparation measures to the victims. In particular, Article 15 of the Agreement clearly spells out that "*Salaries and emoluments of the Cambodian judges and Cambodian personnel shall be defrayed by the Royal Government of Cambodia.*"⁷¹ However, the RGC has consistently failed to uphold its obligation to fund the national side of the court, which strongly damages the already shaken confidence that the Cambodian people and the international community have put into the ECCC. While funding from international donors, including the UN, is helping fill the funding gaps and enabling Case 002/01 to continue, it does not represent a sustainable solution.

⁶⁸ Ms Zainab Hawa Bangura, the special representative to the UN Secretary General on Sexual Violence in Conflict in a statement issued on 1 March 2013:

<www.un.org/apps/news/story.asp?NewsID=44264&Cr=sexual+violence&Cr1=#.UhmKBGSvGRI>.

⁶⁹ For a more comprehensive view on sexual and gender-based crimes under the Khmer Rouge and the need to address them at the ECCC, see De Langis and Studzinski, *Briefing Paper on the ECCC, the Cambodian Women's Hearing, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime* (May 2012) <<http://civilparties.org/wordpress/wp-content/uploads/2013/07/BriefingVAWECCCMay2012FinalProof-2.pdf>>

⁷⁰ Lyma Nguyen and Christoph Sperfeldt, 'A boat without anchors', Jesuit Refugee Service (17 January 2013) <<https://www.jrsusa.org/assets/Publications/File/BoatWithoutAnchorsOnline.pdf>>

⁷¹ ECCC Law on the establishment of the Extraordinary Chambers as amended (2004)

<www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf>.

As such, CCHR recommends the following:

- **The RGC must meet its legal obligations and fully fund the salaries of the ECCC’s national staff without delay;**
- **The UN must continue to fund the international component of the ECCC, while reiterating that the RGC cannot endlessly rely on UN loans to fund the national side of the Court and that only a proper financial involvement of the RGC constitutes a sustainable solution to the current lack of funding; and**
- **Seeing as the funding crisis has also impacted victim’s reparations proceedings, the UN must call upon donors, public and private, to continue to provide substantial financial support to the realization of the reparations projects.**

Case 002/02

In order to maximize the chances to see a second trial segment in Case 002 addressed, the SCC has instructed the Office of Administration of the ECCC to *“immediately explore the establishment of a second panel of national and international judges”*⁷² for the commencement of Case 002/02 after the closing submissions in Case 002/1. However, especially given the funding crisis discussed above, the establishment a new panel of judges – in essence, a second Trial Chamber – will require not just a judicial decision at the ECCC but a commitment by both international donors and the RGC to fund this.

As such, CCHR recommends the following:

- **The Office of Administration of the ECCC must take notice of the SCC’s clear-cut instruction and take the necessary steps with a reasonable timeframe;**
- **The Office of Administration should publically report on their progress; and**
- **The UN, international donors and the RGC must support any decision to establish a new panel of judges and pledge their commitments to bear the financial costs of such a measure.**

Going beyond Case 002/02

As discussed at length in this Briefing Note, it is very likely that the gravest breaches to the Geneva Conventions and the crime of genocide will remain unaddressed, causing the ECCC to potentially fall short of the victims and the public’s expectations. It is therefore of the utmost importance that victims of genocide, religious persecution, forced marriage and other crimes excluded from Case 002/01 receive recognition for the harm they endured.

As such, CCHR recommends the following:

- **The ECCC must develop and implement alternative, non-judicial mechanisms for transitional justice, as mandated in the Victim Support Section under ECCC Internal Rules, providing for reconciliation, memorialization and truth-seeking, to promote and support the recognition and inclusion of the experiences of witnesses and survivors of, inter alia, genocide, religious persecutions and forced marriage under the Khmer Rouge period;**

⁷² SCC, ‘Decision on immediate appeals against Trial Chamber’s second decision on severance of case 002’, Document No. E/284/4/7 (23 July 2013)

- In particular, crimes of gender-based and sexual violence and rape, which have long been considered as non-existent under the Khmer Rouge and are subsequently only addressed under the crime of forced marriage in Case 002, must be fully addressed and included into investigations in Cases 003 and 004; and
- The school curriculum must be reformed to include more discussion related to the gravest crimes committed by the Khmer Rouge, including genocide against the Vietnamese and the Cham, religious persecution, forced marriage and all forms of sexual violence.

Addressing allegations of political interference

The ECCC has been plagued with allegations of political interference. The recent failure of the RGC to pay the national staff is only the latest attempt by the RGC to undermine the promise of justice to the victims of the Khmer Rouge. Furthermore, the RGC's interference in the ECCC's judicial process – especially with regards to Cases 003 and 004, severely threatens the potential impact and legacy of the ECCC. The RGC must therefore refrain at all cost from interfering with the ECCC's operations. To do otherwise would significantly call into question the Court's rulings and taint the verdicts in the eyes of global society at large and, more importantly, the victims themselves.

As such, CCHR recommends the following:

- **The UN must exert additional pressure on the RGC to ensure that it stops obstructing Case 003 and 004; and**
- **The UN must conduct a full investigation into allegations of political interference, not only with respect to Case 003 and 004 but where all proceedings are concerned.**

Promoting the legacy of the ECCC

In light of the state of the Cambodian judicial system, which lacks independence and routinely violates fair trial rights, the ECCC has the potential to impart a positive legacy on Cambodia's judicial system with regards to international standards of justice.

As such, CCHR recommends the following:

- **The RGC, through the Ministry of Justice, must engage in practical initiatives to ensure the incorporation of ECCC legacy, such as training opportunities and practical guidance to lawyers and judges; and**
- **Stakeholders in the judicial sector – in particular, lawyers and judges – must make a concerted effort to review and use, when appropriate, ECCC jurisprudence.**

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